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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EUGENE A. HELMETSIE, HARPER F. ZARKER, JR.,
and TOMASZ PRACEL¹

Appeal 2009-002184
Application 10/774,339
Technology Center 3700

Decided: September 28, 2009

Before WILLIAM F. PATE, III, DANIEL S. SONG, and
KEN B. BARRETT, *Administrative Patent Judges*.

SONG, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The real party in interest is American Shower and Bath Corporation, a division of Masco Corporation (App. Br. 1).

The Appellants appeal under 35 U.S.C. § 134 from a Final Rejection of claims 13-15, 18, 19, and 21-24. Claims 1-12, 16, 17, and 20 have been previously canceled (App. Br. 2). We have jurisdiction over this appeal under 35 U.S.C. § 6(b) (2002).

The claimed invention is directed to a shower surround that includes a corner portion engaged with a base portion, a first wall portion, and a second wall portion. The corner portion includes multiple horizontal shelf slots, the horizontal shelf slots having at least partially arcuate openings in the corner portion to support multiple shelves.

Claim 19, the sole independent claim, reads as follows (App. Br. 9, Claims App'x.; emphasis added):

19. A shower surround comprising:
 - a base portion;
 - a first wall portion;
 - a second wall portion; and
 - a corner portion engaged with said base portion, said first wall portion and said second wall portion, said corner portion comprising a multiple of horizontal shelf slots arranged vertically along a length of said corner portion, *wherein said horizontal shelf slots comprise at least partially arcuate openings in said corner portion* to support a corresponding multiple of shelves.

The prior relied upon by the Examiner in rejecting the claims is:

Armstrong	US 2,036,184	Apr. 7, 1936
Kitamura	US 4,718,131	Jan. 12, 1988
Randall	US 4,886,236	Dec. 12, 1989

The Examiner rejected claims 14, 15, 18, 19, and 21-24 under 35 U.S.C. § 102(b) as anticipated by Armstrong².

The Examiner rejected claims 13-15, 18, 19, and 21-24 under 35 U.S.C. § 103(a) as unpatentable over Kitamura and Randall.

We AFFIRM.

ISSUES

The following issues have been raised in the present appeal:

1. Whether the Appellants have shown that the Examiner erred in finding that Armstrong describes a corner portion having a multiple of horizontal shelf slots that include at least partially arcuate openings as recited in claim 19.

2. Whether the Appellants have shown that the Examiner erred in finding that Armstrong describes partially arcuate openings having a uniform nominal depth extending into the corner portion as recited in claim 22.

3. Whether the Appellants have shown that the Examiner erred in finding that Armstrong describes “wherein said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single, continuous piece” as recited in claim 24.

² The Grounds of Rejection to be Reviewed on Appeal produced by the Appellants (App. Br. 3) does not identify claims 18, 21, and 23, as being rejected as anticipated over Armstrong even though these claims are included in the Final Rejection of December 21, 2006 (Final Office Action 2-3). It appears that the omission of claims 18, 21, and 23 originated in the Pre-Appeal Brief Request for Review filed by the Appellants on March 20, 2007, and is a typographical error.

4. Whether the Appellants have shown that the Examiner erred in finding that Armstrong describes removable shelves as recited in claim 14 or a “snap-in” interface as recited in claim 15.

5. Whether the Appellants have shown that the Examiner erred in concluding that it would have been obvious to one of ordinary skill in the art to incorporate a horizontal shelf slot used in a shelf bracket as described in Randall into a corner part of a shower surround as described in Kitamura to result in a shower surround as recited in claim 19.

6. Whether the Appellants have shown that the Examiner erred in concluding that the combination of Kitamura and Randall renders obvious a shower surround having the blind openings recited in claim 18.

7. Whether the Appellants have shown that the Examiner erred in concluding that the combination of Kitamura and Randall satisfies the limitation of claim 24 reciting “wherein said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single, continuous piece.”

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence.

1. Armstrong describes a corner shelf of the type adapted to be mounted in a corner portion of a room (p. 1, col. 1, ll. 1-10).
2. The Examiner finds that the corner shelf of Armstrong is “capable of being used in a bathroom or shower surround.” (Ans. 3).
3. The Appellants do not contest the Examiner’s factual finding regarding the application of Armstrong to shower surrounds, but

contest various findings that Armstrong describes certain structural elements recited in the rejected claims (App. Br. 3-4; Reply Br. 1-2).

4. The frame of the corner shelf of Armstrong includes an angular standard 1 (i.e., corner portion) defined by side wings 2, a forwardly projecting rib 3 that extends longitudinally of the standard for the full height thereof, and upper and lower arms 4 and 5 which project from opposite sides of the standard in spaced relation thereto. (p. 1, col. 1, l. 45 – p. 1, col. 2, l. 1; figs. 1-4).

5. The corner shelf of Armstrong also includes upper and lower shelves 18 and 19 (i.e., multiple shelves). (Figs. 1, 3, and 4). The rear end of the shelves extends between spaced ends (i.e., horizontal shelf slots or openings) of securing strips 8, 9, and 10 and rests upon the upper ends of strips 9 and 10 (p. 1, col. 2, ll. 35-42; figs. 1, 3, and 4). The forward end of the shelves rests upon blocks 16 which prevent the shelves from sliding forwardly out of position (p. 1, col. 2, ll. 47 – p. 2, col. 1, l. 1; figs. 1, 3, and 4).

6. The shelves of Armstrong “may be easily removed by grasping their forward portions and after tilting them upwardly, shifting them forwardly so that their rear ends or apexes will be withdrawn from between the strips 8, 9 and 10.” (p. 1, col. 2, ll. 47 – p. 2, col. 1, l. 1).

7. In Figures 1 and 4 of Armstrong, the front surface of securing strips 8 and 9 is depicted as being curved (i.e., partially arcuate). (Figs. 1 and 4). In Figure 1, securing strip 10 is shown with phantom lines (Fig. 1).

8. In Armstrong, the lateral portion of the spaced ends (i.e., horizontal shelf slots or openings) located between securing strips 8

and 9, and between strips 9 and 10, are defined by the curved front surface (i.e., partially arcuate) of the securing strips. (Figs. 1 and 4).

9. Figure 3 of Armstrong shows the spaced ends (i.e., horizontal shelf slots or openings) located between securing strips 8 and 9, and between strips 9 and 10, forming openings having, at the bottom of the opening, a depth extending into the corner approximately the same as at the top of the opening and at all points in between. (Fig. 3).

10. Armstrong also teaches that securing strips 8 and 9 are separate pieces that are secured to the standard 1 by screws 11 (p. 1, col. 2, ll. 1-13; fig. 1).

11. Kitamura describes a sanitary facility unit that includes a floor surface R_2 (i.e., base portion), side walls $r1$ and $r2$ (i.e., first and second wall portions), and a corner part R_1 (i.e., corner portion) that is attached to the floor surface and side walls. (Col. 3, ll. 56-60; col. 4, ll. 5-10; fig. 1).

12. In Figure 13, Kitamura describes a storing shelf (*e*) located within the upper portion of corner part R_1 . (Fig. 13). The storing shelf includes “three supporting columns (27*a*), (27*b*), and (27*c*), two side plates (28*a*) and (28*b*) and three shelf plates (29*a*), (29*b*) and (29*c*) spaced apart between the side plates (28*a*) and (28*b*) and formed as a triangular shape...” (Col. 6, ll. 36-42; fig. 13).

13. In Kitamura, shelf plates 29*b* and 29*c* (i.e., horizontal shelves) are removably fixed and supported on the right and left supporting columns 27*a* and 27*b* through pins 30 (col. 6, ll. 42-47; fig. 13).

14. Kitamura does not disclose partially arcuate openings for supporting shelves in the corner part R_1 .

15. Randall describes a shelf support means 11 that can be used to mount a tempered glass shelf 13 to a support member such as a wall 14 of a building or the like (col. 2, ll. 32-34; figs. 1-4).

16. In Randall, the shelf support means includes a bracket means 25 that has an elongated throat 27 (i.e., horizontal shelf slot) for receiving a rear wall 19 of the shelf 13 (col. 2, ll. 42-45; figs. 1, 3, and 4).

17. In Randall, the bracket means 25 is secured to the wall 14 at a desired location using screws 31 that extend through apertures located in the elongated throat 27 of the bracket means 25 (col. 2, ll. 48-52; col. 3, ll. 33-36; figs. 3 and 4). The screws 31 are hidden or covered by the rear wall 19 of the shelf 13 after the rear wall is inserted into the elongated throat 27 of the bracket means 25 (col. 3, ll. 36-38; figs. 3 and 4).

PRINCIPLES OF LAW

Anticipation under 35 U.S.C. § 102 is a question of fact. *Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001). “A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987). In this regard, patent drawings can anticipate claims if the drawings clearly show the claimed structure. *In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972). A drawing teaches all that it reasonably discloses and suggests to a person of ordinary skill in the art. *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979).

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such

that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966).

In *KSR*, the Supreme Court emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” and reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 550 U.S. at 415-16. The Court also affirmed that “when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *Id.* at 416.

The two separate tests for determining whether a prior art reference is analogous are as follows: (1) whether the art is from the same field of endeavor, regardless of the problem addressed; and (2) if the reference is not within the inventor’s endeavor, whether the reference is reasonably pertinent to the particular problem with which the inventor is involved. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). One way to demonstrate that a reference is within the same field of endeavor is by showing that the reference describes something that is structurally similar to that claimed. *Id.*

at 1325-26. Another way to demonstrate that a reference is analogous is by showing that the reference is reasonably pertinent to the same or similar problem. *See In re ICON Health and Fitness, Inc.*, 496 F.3d 1375, 1379-81 (Fed. Cir. 2007).

With respect to claim construction, we determine the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Where no explicit definition for a term is given in the specification, the term should be given its ordinary meaning and broadest reasonable interpretation. *See E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1368 (Fed. Cir. 2003). The ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc).

“Both anticipation under § 102 and obviousness under § 103 are two-step inquiries. The first step in both analyses is a proper construction of the claims. . . . The second step in the analyses requires a comparison of the properly construed claim to the prior art.” *Medichem, S.A. v. Rolabo, S.L.*, 353 F.3d 928, 933 (Fed. Cir. 2003) (internal citations omitted).

ANALYSIS

Anticipation rejection over Armstrong

The Examiner rejects claims 14-15, 18-19, and 21-24, finding Armstrong describes all of the claimed structural elements thereof, and the

device of Armstrong is “capable of being used in a bathroom or shower surround.” (Ans. 3-4). In regard to the latter, the Appellants do not allege any error with respect to the Examiner’s finding regarding the application of Armstrong to shower surrounds (FF 3).

With respect to the anticipation rejection, the Appellants argue the patentability of claims 14-15, 19, 22, and 24 (App. Br. 3-4; Reply Br. 1-2). Claims 18, 21, and 23, which depend directly from independent claim 19, are not separately argued by the Appellants. Thus, these dependent claims stand or fall with their corresponding independent claim. *See* 37 C.F.R. § 41.37(c)(1)(vii).

We separately address the Appellants’ arguments directed to various claims rejected as anticipated *infra*.

Claim 19

Claim 19 recites a corner portion having a multiple of horizontal shelf slots that include at least partially arcuate openings. The Examiner finds that Figures 1 and 4 depict “openings between members 8, 9 10 for supporting shelves 18 and 19 being at least partially arcuate at the front edges due to the curved surfaces of members 8, 9 and 10” as recited in claim 19 (Ans. 6). The Appellants contend that the figures “do not show enough detail to support a conclusion that the openings are at least partially arcuate as claimed, and the description of Armstrong does not describe the shape of the openings.” (App. Br. 3).

Armstrong does not discuss in the portion of the Specification that corresponds to the drawings the shape of the spaced ends (or openings) between securing strips 8 and 9, and securing strips 9 and 10. However,

Figures 1 and 4 clearly show that the front (outer) surface of securing strips 8 and 9 is curved, or “partially arcuate” (FF 7). In this regard, we note that patent drawings can anticipate claims if the drawings clearly show the claimed structure. *In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972); *see also In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979). Hence, because the curved front surface of the securing strips defines the lateral portion of the openings (FF 8), it follows that the openings are also curved, or “at least partially arcuate” as recited in claim 19. In this regard, we also note that claim 19 does not specifically recite how or what portion of the openings is partially arcuate. Thus, we find no reversible error with the Examiner’s reliance on Figures 1 and 4 in rejecting claim 19. Since we have found that the Appellants have failed to show the Examiner erred in rejecting claim 19, we likewise find that the Appellants have failed to show the Examiner erred in rejecting claims 18, 21, and 23, which depend from claim 19 and for which no separate arguments are presented.

Claim 22

Claim 22, which ultimately depends from claim 19, recites partially arcuate openings having “a uniform nominal depth” extending into the corner portion. The Examiner finds that Figure 3 of Armstrong “clearly shows openings between members 8, 9 10 for supporting shelves 18 and 19 having a uniform depth extending into the corner.” (Ans. 6). The Appellants argue that the figures “do not show enough detail to support this interpretation, and the description of Armstrong does not describe that the openings have a uniform nominal depth as claimed.” (App. Br. 3).

While we agree that Armstrong does not discuss the depth of the spaced ends (or openings) between securing strips 8 and 9, and securing strips 9 and 10, we disagree with the Appellants' contention and find no reversible error in the Examiner's rejection. As we understand the rejection, the Examiner finds the "uniform nominal depth" limitation to be satisfied because the depth of the spaced ends (or openings) are illustrated in Figure 3 as being constant (i.e., uniform) from the bottom to the top of the openings (FF 9). While the Appellants may be arguing that claim 22 requires a uniform profile along the entire arc of the openings, we note that claim 22 does not specifically recite the manner in which the uniformity in depth is measured. Moreover, neither the Appellants' Specification, nor the Specification for Application 10/693,616 incorporated by reference therein (*see* Appellants' Spec. ¶ [17]), contain any disclosure that would preclude the Examiner's broader interpretation of "uniform nominal depth". Therefore, the Examiner's anticipation rejection of claim 22 is sustained.

Claim 24

In the Reply Brief, the Appellants note that, due to a typographical error, dependent claim 24 erroneously depends directly from independent claim 19 instead of claim 21 which provides antecedent basis for various recited limitations ("upper wall portion", "lower wall portion", and "arcuate rear wall portion") (Reply Br. 1). Therefore, in this appeal, we treat claim 24 as depending from claim 21. This error should be corrected in any future prosecution.

Claim 24 recites "wherein said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single,

continuous piece.” The Examiner contends that securing strip 8 corresponds to the recited upper wall portion, securing strip 9 corresponds to the recited lower wall portion, and standard 1 corresponds to the recited arcuate rear wall portion (Ans. 4), and that these elements meet the “single, continuous piece” limitation after being assembled together (Ans. 6).

The Appellants argue that the Examiner’s claim interpretation is improper because separate pieces assembled together do not satisfy the “single, continuous piece” limitation (App. Br. 4; Reply Br. 1). The Appellants also argue that “the ‘single, continuous piece’ recited in claim 24 is in reference to the corner portion, not the walls and base portions as the Examiner suggests.” (Reply Br. 1). We note that the Appellants do not contest the Examiner’s finding that standard 1 is arcuate.

We agree with the Examiner. The claim does not require the recited components to be an integral, unitary piece. Rather, the claim merely recites that the recited components comprise a single, continuous piece. As discussed *infra* with respect to the obviousness rejection of claim 24, the term “continuous” is defined as “in immediate connection or spatial relationship”. Hence, we conclude that the claim language, when broadly construed, encompasses devices in which components thereof are assembled together to provide a continuous interconnection therebetween. In this regard, we note that giving broad construction to claim terms is not unreasonable during examination because the applicant can amend the claims. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d at 1364. Hence, we agree with the Examiner that this claim limitation is satisfied by Armstrong, and the Examiner’s anticipation rejection is sustained.

Claims 14 and 15

In the Appeal Brief, the Appellants point out that “the rejection fails to mention or consider [claims 14 and 15] in the body of the rejection,” and summarily assert that Armstrong does not “disclose the claimed features.” (App. Br. 4). In the Answer, the Examiner contends that upper and lower shelves 18 and 19 are removable as recited in claim 14, and have a “snap-in” interface as recited in claim 15 (Ans. 6). In the Reply Brief, rather than substantively responding to the Examiner’s findings with rebuttal arguments or evidence, the Appellants request that the Examiner reopen prosecution “so that Appellant has a full and fair opportunity to respond” because “[i]t is only at this late stage that the Examiner has provided any substance for rejecting claims 14 and 15.” (Reply Br. 2). The remedy being requested is from the Examiner and the Appellants should have sought relief therefrom by petition. Hence, we are constrained to sustain the Examiner’s rejection of claims 14 and 15.

Obviousness rejection over Kitamura and Randall

The Examiner rejects claims 13-15, 18, 19, and 21-24 as obvious over the combination of Kitamura and Randall (Ans. 4-5). In addition to arguing the rejected claims as a group, the Appellants separately argue the patentability of claims 18 and 24 (App. Br. 4-7; Reply Br. 2). Claims 13-15 and 21-23, which ultimately depend from independent claim 19, are not separately argued by the Appellants. Thus, these dependent claims stand or fall with independent claim 19. *See* 37 C.F.R. § 41.37(c)(1)(vii).

We address the Appellants’ arguments *infra*.

Claim 19

The Examiner's rejection of independent claim 19 is based on the finding that Kitamura describes all of the recited limitations except for the partially arcuate openings in the corner portion for supporting shelves (Ans. 4; FF 11-14). To cure this deficiency, the Examiner relies on Randall for teaching "supporting means for securing a shelf to a wall comprising a bracket 25 having a first arm 33 and a second arm 35 and an arcuate opening 27 therebetween a support shelf." (*Id.*; *see also* FF 15-17). As we understand the Examiner's rejection, the Examiner finds that the elongated throat 27 of Randall's bracket 25 is a partially arcuate opening. The Appellants do not contest this finding. The Examiner concludes that it would have been obvious to one of ordinary skill in the art "to substitute the brackets for the pins of the Kitamura et al shelves in view of the teaching of the Randall reference for supporting the shelves in the corner wall, wherein so doing would amount to a mere substitution of one functional equivalent supporting means for another within the same art that would work equally well in the Kitamura et al shower device." (Ans. 4-5).

Firstly, the Appellants summarily assert that Randall is non-analogous art because it is not specifically related to shower surrounds. (App. Br. 4; *see also* Reply Br. 2). Although Randall is not specifically directed to shower surrounds, Randall is directed to the field of shelving and support devices for mounting and securing shelves to vertical structures (FF 15), which is also a field to which the Appellants' invention is partially directed. *Bigio*, 381 F.3d at 1325-26. Moreover, Randall is pertinent to the particular problem with which the claimed invention is involved, that is, supporting

shelves on vertical structures. Therefore, we disagree with the Appellants' summary assertion and find that Randall is analogous art.

Secondly, the Appellants argue that one of ordinary skill in the art would not combine Randall with Kitamura as suggested by the Examiner (App. Br. 5; *see also* Reply Br. 2). In this regard, the Appellants contend that the pins of Kitamura and the bracket of Randall are not functional equivalents within the field of shower surrounds because the bracket of Randall is more complex and requires more components than the pins of Kitamura (App. Br. 5; *see also* Reply Br. 2). The Appellants also contend that the bracket of Randall would require more space to accommodate shelves than the pins of Kitamura provide (App. Br. 5).

Based on the arguments set forth by the Appellants in the Appeal Brief and the Reply Brief, we find no reversible error with the Examiner's proposed combination of Kitamura and Randall. In particular, the Appellants' arguments are based on a speculative implementation or bodily incorporation of the bracket of Randall into the corner part of the shower surround of Kitamura. In this regard, "[t]he test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art." *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981). "[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review." *In re Sneed*, 710 F.2d 1544, 1550 (Fed. Cir. 1983); *see also In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) ("Combining the teachings of

references does not involve an ability to combine their specific structures.”). Moreover, “when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *KSR*, 550 U.S. at 416.

In the present case, the Appellants do not provide any persuasive evidence or reasoning to rebut the Examiner’s finding that the pins of Kitamura and the bracket of Randall are functional equivalent supporting means. We concur with the Examiner that the pins of Kitamura and bracket of Randall are structures that perform the same function of supporting shelves. We further note that the Appellants’ arguments fail to address the underlying function of each structure. Instead, the Appellants are essentially arguing that Randall is non-analogous so one of ordinary skill in the art would not be motivated to combine Randall with Kitamura as suggested by the Examiner. However, as discussed *supra*, this argument is unavailing because Randall is analogous. The Appellants’ claimed invention merely substitutes the pins that support Kitamura’s shelves with an equivalent structure well known in the field of shelving and support devices for mounting and securing shelves to vertical structures as evidenced by Randall to yield a predictable result. *See KSR*, 550 U.S. at 415-16.

Lastly, the Appellants argue that the proposed combination does not result in the claimed invention because “the slots would be within the bracket, not the corner portion.” (App. Br. 6). We do not find this argument persuasive. As we understand it, the Examiner’s obviousness conclusion is premised on incorporating the elongated throat 27 (i.e., horizontal shelf slot) of Randall’s bracket 25 (not the entire bracket as characterized by the

Appellants) into the corner part R₁ of Kitamura to result in the invention of claim 19. Thus, the Examiner's proposed combination of Kitamura and Randall results in a corner portion having multiple horizontal shelf slots as recited in claim 19. As required, the Examiner has also articulated a reason why one of ordinary skill in the art would combine the teachings of Kitamura and Randall in the manner suggested (Ans. 4-5) which is rational and sufficient to conclude that the claimed invention is obvious. *See KSR*, 550 U.S. at 418.

Therefore, in view of the above, the Appellants have not shown that the Examiner erred in concluding that the subject matter of claim 19 is obvious over Kitamura and Randall. Since we have found that the Appellants have failed to show the Examiner erred in rejecting claim 19, we likewise find that the Appellants have failed to show the Examiner erred in rejecting claims 13-15 and 21-23 which ultimately depend from independent claim 19, these claims not having been argued separately.

Claim 18

Claim 18, which depends from independent claim 19, further recites that the horizontal shelf slots include "blind openings that extend into said corner portion." While acknowledging that some water could "slip through" the screw holes, the Examiner contends that the proposed combination satisfies this limitation because the screws 31 which secure Randall's bracket to the wall "are hidden inside a cavity of the bracket 11" (Ans. 7). While not entirely clear from the record, the Examiner appears to consider the recited "blind openings" limitation to be satisfied by one or more screw

holes that are hidden inside the elongated throat 27 of Randall's bracket 25 by the rear wall 19 of the shelf 13.

The Appellants essentially argue that one of ordinary skill would not utilize the screws 31 and corresponding screw holes of Randall in Kitamura's shower surround because they would "penetrate through the wall and provide a water path for water leakage into the wall cavity." (App. Br. 6-7; *see also* Reply Br. 2). In support, the Appellants contend that "using a blind opening as claimed" would provide a shower surround that is fully enclosed and waterproof to prevent water intrusion into the wall cavity, which is a desired feature of the claimed invention (App. Br. 6; Reply Br. 2).

We agree with the Appellants. We fail to see how one of ordinary skill in the art would consider screw holes covered by a shelf to be a blind opening, and are persuaded that one of ordinary skill in the art would not use the screws and screw holes of Randall in the manner suggested by the Examiner because of the potential for water intrusion. Accordingly, the Examiner's obviousness rejection of claim 18 is not sustained.

Claim 24

Claim 24 recites "said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single, continuous piece." The Examiner contends that corner part R₁ of Kitamura corresponds to the recited corner portion, first arm member 33 of Randall corresponds to the recited upper wall portion, second arm member 35 of Randall corresponds to the recited lower wall portion, and wedge member 39 of Randall corresponds to the recited arcuate rear wall portion (Ans. 5

and 8). The Examiner further contends that these elements meet the “single, continuous piece” limitation when assembled together. *Id.*

The Appellants argue that the Examiner’s interpretation of the claim term “continuous” is contrary to “the ordinary understanding of the word.” (App. Br. 7). In support, the Appellants contend that “continuous” is commonly understood to mean extending without a break or interruption, citing to an online dictionary. *Id.* (citing <http://dictionary.reference.com/browse/continuous>). Thus, the Appellants contend that “[o]nce assembled together, the pieces would not be continuous because there would be a discontinuity or interruption at the interface between the bracket 25 and the corner portion R₁.” *Id.*

However, the Appellants’ cited on-line dictionary defines “continuous” as “2. being in immediate connection or spatial relationship: *a continuous series of blasts; a continuous row of warehouses.*” The Examiner’s rejection construing an assembly of connected components as being continuous is consistent with this definition. Moreover, we note that making elements of a device integral or separable is considered to be an obvious design choice and does not render an invention patentable. *See In re Larson*, 340 F.2d 965, 968 (CCPA 1965); *In re Dulberg*, 289 F.2d 522, 523 (CCPA 1961).

Thus, in view of the above, the Appellants’ argument does not establish Examiner error and the obviousness rejection of claim 24 is sustained.

CONCLUSIONS

1. The Appellants have not shown that the Examiner erred in finding that Armstrong describes a corner portion having a multiple of horizontal shelf slots that include at least partially arcuate openings as recited in claim 19.

2. The Appellants have not shown that the Examiner erred in finding that Armstrong describes partially arcuate openings having a uniform nominal depth extending into the corner portion as recited in claim 22.

3. The Appellants have not shown that the Examiner erred in finding that Armstrong describes “wherein said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single, continuous piece” as recited in claim 24.

4. The Appellants have not shown that the Examiner erred in finding that Armstrong describes removable shelves as recited in claim 14 or a “snap-in” interface as recited in claim 15.

5. The Appellants have not shown that the Examiner erred in concluding that it would have been obvious to one of ordinary skill in the art to incorporate a horizontal shelf slot used in a shelf bracket as described in Randall into a corner part of a shower surround as described in Kitamura to result in a shower surround as recited in claim 19.

6. The Appellants have shown that the Examiner erred in concluding that the combination of Kitamura and Randall renders obvious a shower surround having the blind openings recited in claim 18.

7. The Appellants have not shown that the Examiner erred in concluding that the combination of Kitamura and Randall satisfies the

limitation of claim 24 reciting “wherein said corner portion, said upper wall portion, said lower wall portion, and said arcuate rear wall portion comprise a single, continuous piece.”

DECISION

1. The Examiner’s rejection of claims 14-15, 18-19, and 21-24 under 35 U.S.C. § 102(b) as anticipated by Armstrong is AFFIRMED.
2. The Examiner’s rejection of claims 13-15, 19, and 21-24 under 35 U.S.C. § 103(a) as unpatentable over Kitamura and Randall is AFFIRMED.
3. The Examiner’s rejection of claim 18 under 35 U.S.C. § 103(a) as unpatentable over Kitamura and Randall is REVERSED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

rvb

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